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11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA – OAKLAND COURTHOUSE

13

14 CARL ZEISS MEDITEC, INC.,
15 Plaintiff,
16 v.
17 TOPCON MEDICAL SYSTEMS, INC.,
18 TOPCON HEALTHCARE SOLUTIONS,
19 INC., TOBIAS KURZKE, GREG
HOFFMEYER, GENEVIEVE FAY,
KATALIN SPENCER, KEITH BROCK,
CHARLES GUIBORD, JR., JOSEPH
CICCANESE, MELISSA GOEKE, AND
DOES 1-50,
21 Defendants.

Case No. 4:19-cv-04162 SBA

**DEFENDANTS TOPCON MEDICAL
SYSTEMS, INC. AND TOPCON
HEALTHCARE SOLUTIONS, INC.’S
OPPOSITION TO PLAINTIFF CARL ZEISS
MEDITEC, INC.’S MOTION FOR
PRELIMINARY INJUNCTION AND
REQUEST FOR EXPEDITED DISCOVERY**

Date: September 11, 2019
Time: 2:00 p.m.
Location: Oakland Courthouse
1301 Clay Street
Oakland, CA 94612

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Case No. 4:19-cv-04162-SBA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Despite conceding that it is lawful for an employee to move to a competitor company, Plaintiff
4 Carl Zeiss Meditec, Inc. (“CZMI”) initiates this lawsuit based on just that – the fact that several of its
5 employees -- Tobias Kurzke, Greg Hoffmeyer, Genevieve Fay, Katalin Spencer, Keith Brock, Charles
6 Guibord, Jr., Joseph Ciccanesi, and Melissa Goeke -- took jobs with Topcon,¹ one of CZMI’s
7 competitors. What’s more, without identifying a single specific trade secret that has been wrongfully
8 taken or put to use by any of the eight individual defendants or Topcon, and based on nothing more
9 than pure speculation and conjecture, CZMI asks this Court to stymie Topcon’s legitimate and lawful
10 competition and authorize intrusive and unnecessary discovery into those employees’ personal devices.
11 The generality of CZMI’s claims, coupled with its attempts to obtain invasive discovery and its failure
12 to provide concrete examples of any allegedly misappropriated trade secrets, suggest that CZMI’s
13 current motion is less a mission to protect intellectual property and more an attempt to secure
14 competitive intelligence and marketplace advantages. Pursuant to Civil Local Rule 7-4, Topcon
15 identifies the following issues to be decided: Whether CZMI has reasonably identified its trade secrets
16 with specificity; whether CZMI has presented sufficient evidence to show that it is likely to prevail in
17 demonstrating that Topcon misappropriated its trade secrets; and whether CZMI’s 15-month delay in
18 seeking relief and absence of evidenced demonstrating Topcon’s alleged misappropriation precludes a
19 finding of irreparable harm.

20 | II. STATEMENT OF FACTS

A. TMS And THS Are Well-Established Competitors Of CZMI

22 Topcon Medical Systems (“TMS”) is a well-respected developer and supplier of ophthalmic
23 diagnostic equipment in the global medical device industry. (Declaration of Kristen Nelson (“Nelson
24 Decl.”), ¶ 3.) Topcon Corporation, which is TMS’s parent corporation, was established in September
25 1932, and is a comprehensive ophthalmic device manufacturer. (*Id.* at ¶ 4.) It is a pioneer in the industry,
26 introducing the world’s first commercial back-of-the-eye spectral domain and swept source optical

²⁷ ²⁸ ¹ Topcon Medical Systems, Inc. (“TMS”) is the American division of Topcon Corporation. Topcon Healthcare Solutions, Inc. (“THS”) is the division of Topcon Corporation focused on software solutions (as opposed to hardware). Hereinafter, TMS and THS are collectively referred to as “Topcon.”

1 coherence tomography (“SS OCT”) system in 2012, a major innovation in eye-care. (*Id.*) In 1970,
2 Topcon Corporation established TMS, the Company’s American division. (*Id.* at ¶ 5.) In 2018, Topcon
3 Corporation established THS, which creates software solutions for the eye-care industry as the software
4 and tele-ophthalmology arm of Topcon. (*Id.* at ¶ 6.) Since its incorporation in 2018, THS has remained
5 in growth mode and has hired more than 100 employees globally. (*Id.* at, ¶ 7.) Topcon Corporation has
6 nearly 4,000 employees total. (*Id.*)

7 **B. Topcon’s Products Have Lawfully Competed with CZMI’s Products Since At Least 2007**

8 The technology at issue in this dispute can be categorized as either hardware or software. Both
9 CZMI and Topcon market commercially available OCT hardware designed to take MRI-like images
10 of the human eye for diagnostic and treatment purposes. (Declaration of Tobias Kurzke (“Kurzke
11 Decl.”), ¶ 5.) Topcon released the world’s first 3D OCT, the 3D OCT-1000, in 2006, *before* CZMI
12 released an OCT product. (*Id.* at ¶ 6.) Topcon’s current OCT product, released in 2013, is called
13 Maestro. (*Id.* at ¶ 6.) CZMI’s OCT product, the Cirrus, was released in 2007 and is still on the market.
14 (*Id.* at ¶ 7.)

15 Topcon also has a commercially available SS-OCT product called the Triton, which was
16 released in 2015 and was preceded by the Atlantis, released in 2012. (*Id.* at ¶ 8.) CZMI also produces a
17 SS-OCT device, the Plex Elite 9000, which is not available commercially but is currently used for
18 clinical research only. (*Id.* at ¶ 9.) CZMI does not currently have a commercially available SS-OCT
19 device. (*Id.* at ¶ 9.) Like standard OCT devices, the Triton and the Plex Elite 9000 take cross-sectional
20 images of the human eye. (*Id.* at ¶ 10.) However, the technology in the SS-OCT devices is newer, faster,
21 and takes more detailed images than traditional OCT devices. (*Id.* at ¶ 10.). Unlike the Plex Elite 9000,
22 the Triton also includes a fundus camera which can take a photo of the back of the eye. (*Id.* at ¶ 11.)

23 Topcon and CZMI also make competing software programs, which give eye care professionals
24 the ability to collect, store, manage, analyze, and access digital ophthalmic data from various devices.
25 (Kurzke Decl., ¶ 12.) Topcon acquired Anka Systems in about 2006, which manufactured a product
26 called Eyeroute. (*Id.* at ¶ 13.) Topcon turned Eyeroute into Synergy in 2011, and then turned Synergy
27 into Harmony (the current iteration of Topcon’s data management software). (*Id.* at ¶ 13.) Said another
28 way, Topcon has been selling a version of Harmony since 2007. (*Id.* at ¶ 13.) Topcon is in the process

1 of developing an extension of Harmony called Glaucoma Module, which has been under development
2 since March 2018 and in close collaboration with one of the world's leading glaucoma experts, Dr.
3 Donald Hood from Columbia University. (*Id.* at ¶ 14.) CZMI's competitor software product is called
4 FORUM and was released in 2009. (*Id.* at ¶ 15.) Retina Workplace and Glaucoma Workplace are
5 extensions of the FORUM product. (*Id.* at ¶ 15.) CZMI also maintains a consortium of researchers
6 called the ARI Portal, a web site where members of the ARI Network from high-level research
7 institutions can collaborate on the potential clinical uses of the Plex Elite 9000. (*Id.* at ¶ 16.) Topcon
8 does not currently have a product that competes with the ARI Network or the ARI Portal and does not
9 intend to develop one because Topcon's SS-OCT device is not directed toward high level researchers
10 but is directed toward more general commercial application and everyday clinical care. (*Id.* at ¶ 17.)²

11 **C. As THS Has Grown, Several CZMI Employees Have Been Hired by Topcon**

12 In the last year, Topcon has about 500 new employees, including about 300 new employees in
13 the United States alone. (Nelson Decl., ¶ 8.) Of those new hires, eight employees left their employment
14 with CZMI to join Topcon: Tobias Kurzke on April 30, 2018;³ Greg Hoffmeyer on July 10, 2018;
15 Katalin Spencer on August 8, 2018; Genevieve Fay on November 7, 2018;⁴ Melissa Goeke on March
16 4, 2019; Keith Brock on March 11, 2019; Charles Guibord, Jr. on March 15, 2019; and Joseph
17 Ciccanesi on March 18, 2019. (*Id.* at ¶ 8.) CZMI named these eight Topcon employees who formerly
18 worked at CZMI as defendants in this action, including Ms. Goeke, who worked as an Inventory
19 Analyst generating inventory reports and performing inventory audits for CZMI and now works for
20 Topcon Positioning Systems (TPS) in the agriculture and infrastructure realm. (*Id.* at ¶ 9).

21 At all relevant times, Topcon has respected the confidential information of third parties. Upon
22 hire, Topcon employees hired from competing companies are required to disclose any non-disclosure
23 agreements or confidentiality agreements they executed with their prior employer. (Nelson Decl., ¶ 10.)

24 ² Plainly, CZMI's statement that Topcon "lacks products that compete successfully" with CZMI
25 products is incorrect. (CZMI MPA 3:16.)

26 ³ When Mr. Kurzke joined Topcon in April 2018, Topcon was already producing and selling Maestro,
27 Triton, and Synergy, the predecessor to Harmony. Topcon was also already working on the design of
the Glaucoma Module. (Kurzke Decl., ¶ 18.) Moreover, CZMI has not properly described Mr. Kurzke's
role at CZMI. By way of illustration only, Mr. Kurzke was never a Product Manager of FORUM. (*Id.*
at ¶ 3.)

28 ⁴ In December 2018, one of Topcon's marketing executives, Bob Gibson, accepted employment with
Carl Zeiss Meditec AG.

1 In early April 2019, CZMI contacted Topcon regarding the departure of its employees. (Declaration of
2 Randy Samuels (“Samuels Decl.”), ¶ 3.) Topcon assured CZMI that it respected CZMI’s confidential
3 information and intended to comply with its legal obligations. (*Id.*)

4 **D. CZMI’s Motion Presents No Credible Evidence Supporting Its Theory That Topcon**
5 **Misappropriated Its Trade Secrets**

6 Despite ample opportunity to investigate its claims in the *fifteen months* since Mr. Kurzke left
7 CZMI for Topcon, CZMI presents no credible evidence of misappropriation of confidential information
8 or trade secrets. CZMI’s motion rests on three points, all of which are faulty.

9 *i. The February 22, 2019 E-mail Discusses Information Available in the Public Domain*

10 On February 21, 2019, Mr. Hoffmeyer attended a public industry symposium, where he
11 watched CZMI’s Head of Global Diagnostics, Angelo Rago, present on the Plex Elite 9000.
12 (Declaration of Greg Hoffmeyer (“Hoffmeyer Decl.”), ¶ 3.)⁵ During his public presentation, Mr. Rago
13 said that an SS-OCT device was “three or four generations away” from mainstream use. Mr. Hoffmeyer
14 presented immediately after Mr. Rago and said that Topcon had already sold 3000 Triton SS-OCTs
15 globally. (Hoffmeyer Decl., Ex. 1.) [REDACTED]

16 [REDACTED]

17 The next day, Genevieve Fay, Topcon’s Senior Director of Marketing and another former
18 CZMI employee, responded to Mr. Hoffmeyer’s e-mail. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 (Hoffmeyer Decl., Ex. 1.) [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 (Id.) Everything about CZMI which was discussed in the February

25 22-23, 2019 e-mail is publicly available information. (*Id.* at ¶ 6.)

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⁵ Because the Court has not yet ruled on Plaintiff’s administrative motion to file under seal (ECF No. 8) and out of an abundance of caution, Topcon submits Exhibit 1 to the Declaration of Greg Hoffmeyer and corresponding portions of Mr. Hoffmeyer’s declaration and this memorandum under seal. Topcon’s filing of these papers under seal may not be construed as a concession that the documents are appropriate to be filed under seal and, in fact, Topcon opposed Plaintiff’s motion. (ECF No. 21.)

1 ii. *The White Paper That CZMI Contends Mr. Kurzke Wrote in March 2019 Does Not Exist*
2 *and the Poster Does Not Evidence Any Trade Secret Use*

3 In March 2019, at the World Glaucoma Congress in Melbourne, Australia, Mr. Kurzke
4 presented a poster on Topcon’s Glaucoma Module, an extension of the product Topcon has sold some
5 version of since 2007. (Kurzke Decl., ¶ 19.) The purpose of the poster was to demonstrate how
6 Glaucoma Module will be *different* from CZMI’s publicly available Glaucoma Workplace product.
7 (*Id.* at ¶ 20.) In particular, the poster noted that Glaucoma Workplace might not be the “ideal format”
8 for managing patient information and presented alternative ways of capturing and displaying such
9 information. (*Id.* at ¶ 20.) Topcon was developing its Glaucoma Module before Mr. Kurzke ever
10 became an employee there, and nothing about the poster’s discussion of Glaucoma Workplace’s format
11 suggests that Glaucoma Module has been developed with any information taken from CZMI, let alone
12 any CZMI trade secrets. (Kurzke Decl., ¶ 21.) Finally, despite CZMI’s claims to the contrary, Mr.
13 Kurzke has never prepared or disseminated any white paper on Glaucoma Workplace. (ECF No. 1
14 (“Complaint”), ¶ 90.)

15 iii. *CZMI’s Allegation that Topcon Says It “Cracked the Code” Is Not Credible Evidence*

16 Throughout its moving papers, CZMI suggests that someone at Topcon has told customers that
17 they have “cracked the code” of CZMI’s purported “dominance” in the industry by hiring employees
18 away from CZMI. (ECF No. 9, Plaintiff’s MPA in Support of Motion for Preliminary Injunction
19 (“CZMI MPA”), ii:21-24, 4:16-20, 10:1-4.) As a preliminary matter, Topcon **objects** to this alleged
20 statement as hearsay. (Fed. R. Civ. P. 801.) More importantly, though, this alleged statement is not
21 supported by a shred of credible evidence. Indeed, CZMI presents this statement as fact, but it never
22 once identifies the person who allegedly made the statement, the circumstances that surrounded it, or
23 even where CZMI heard this unsubstantiated rumor. (Burton Decl., ¶ 17.)

24 **III. CZMI CANNOT OBTAIN A PRELIMINARY INJUNCTION ABSENT A “CLEAR**
25 **SHOWING” OF IRREPARABLE HARM AND A STRONG LIKELIHOOD OF SUCCESS**

26 A preliminary injunction is “an extraordinary and drastic remedy” that should not be granted
27 unless the movant carries its burden of persuasion *by a clear showing*. (*Mazurek v. Armstrong*, 520
28 U.S. 968, 972 (1997) *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970) *aff’d on other grounds in*
 Sierra Club v. Morton, 405 U.S. 727 (1972).) To establish a right to a preliminary injunction here, CZMI

1 must demonstrate that: (1) it is likely to succeed on the merits of its breach of contract and/or trade
2 secrets claim; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of
3 equities tips in its favor; and (4) the injunction is in the public interest. (*Winter v. Nat. Res. Def. Council,*
4 *Inc.* 555 U.S. 7, 20 (2008).) A plaintiff must prove *each* of the above elements to be awarded a
5 preliminary injunction, whereas CZMI fails to satisfy any of them. Therefore, the Court should deny
6 CZMI's request for a preliminary injunction.

7 **IV. CZMI IS UNLIKELY TO PREVAIL ON ITS TRADE SECRET CLAIM BECAUSE
8 CZMI CANNOT SPECIFICALLY IDENTIFY ITS TRADE SECRETS OR DEMONSTRATE
THAT TOPCON MISAPPROPRIATED THOSE SECRETS⁶**

9 Under the California Uniform Trade Secrets Act ("CUTSA") and the federal Defend Trade
10 Secrets Act ("DTSA"), CZMI is unlikely to prevail on its trade secret claim because it has failed to
11 show either (1) the existence of a trade secret; or (2) Topcon's misappropriation of a trade secret.
12 (*AccuImage Diagnostics Corp. v. Teraecon, Inc.*, 260 F. Supp. 2d 941, 950 (N.D. Cal. 2003).)

13 **A. CZMI Fails to Identify a Trade Secret with Reasonable Particularity**

14 To begin discovery and obtain a preliminary injunction, CZMI must first identify its alleged
15 trade secrets with "reasonable particularity." (Cal. Civ. Proc. Code § 2019.210; *Action Learning Sys.,*
16 *Inc. v. Crowe*, 2014 WL 12564011, at *4 (C.D. Cal. Aug. 11, 2014); *WeRide Corp. v. Huang*, 379
17 F.Supp.3d 834, 845-46 (N.D. Cal. 2019).) CZMI cannot carry this "heavy burden ... without specifying
18 what, exactly, it is trying to protect." (*Action Learning Sys.*, 2014 WL 12564011, at *4.) Indeed, Federal
19 Rule of Civil Procedure 65 states that, if the Court issues a preliminary injunction, it must do so by
20 "describe[ing] in reasonable detail – and not by referring to the complaint or other document – the act
21 or acts restrained or required." (Fed. R. Civ. P. 65(d)(1).) Without a clear and specific description of
22 CZMI's alleged trade secrets, this Court cannot restrict Topcon from using them in "reasonable detail."⁷

23 ⁶ Although briefly referenced in its moving papers, CZMI failed to provide any argument to support its
24 position that it is likely to succeed on the merits of its breach of contract claims. (CZMI MPA 5:19-20.)
That alone is sufficient to doom its request for a preliminary injunction as to that claim. Moreover,
25 CZMI cannot show that it is likely to succeed on the merits of its breach of contract claim because the
non-solicitation agreement at issue is unenforceable. (See *WeRide Corp. v. Huang*, 379 F. Supp. 3d
26 834, 851-852 (N.D. Cal. 2019) (doubting enforceability of non-solicitation covenant). Topcon denies
that any of its employees violated their non-solicitation agreement, denies that the non-solicitation
agreement is enforceable, and intends to bring a Motion to Dismiss CZMI's claims on these grounds.

27 ⁷ CZMI suggests that, if Topcon raises "doubts as to the sufficiency of the trade secret disclosure at this
28 stage ... CZMI is willing to submit such evidence in a reply in support of this motion." (CZMI MPA,
11:5, fn. 2.) However, it is axiomatic that CZMI cannot present new evidence in support of its motion

1 Here, CZMI all but concedes that it has not sufficiently identified the subject trade secrets that
2 Topcon allegedly misappropriated. (CZMI MPA, 11:5, fn. 2.) Instead, CZMI vaguely identifies the
3 information that it seeks to protect as including:

4 various types of information related to the development and commercialization of the
5 CZMI ODx Products, including but not limited to, software, source code, data,
6 formulas, specifications, drawings, workflows, screen shots, mockups, product road
7 maps, requirements documents, application notes, and other information used for
8 software development. (*See Complaint ¶¶ 41-50.*) The CZMI trade secrets also include
9 various types of information related to the sales and marketing-related aspects of the
10 CZMI ODx Products, including but not limited to business methods, marketing plans,
11 customer lists, customer contact information, pricing guidelines (including margin data
12 and other unique customer pricing information, such as discounts), historical pricing
13 information, customers' business needs, customers' preferences, and methods for
14 attracting and retaining customers in this nice [sic] industry. (CZMI MPA, 10:19-11:1.)

15 CZMI's boilerplate disclosure fails to specifically identify its alleged trade secrets, leaving
16 Topcon and the Court to guess about "what, exactly, it is trying to protect." (*Action Learning Sys.*, 2014
17 WL 12564011, at *4.)

18 Moreover, CZMI's failure to identify its trade secrets with particularity casts doubt on the
19 propriety of treating CZMI's alleged confidential information as a trade secret. In its Complaint, CZMI
20 alleges that all individual defendants had access to CZMI's trade secrets. (Complaint, ¶ 8.) However,
21 in order to establish trade secret status, the owner must take reasonable steps to protect the secrecy of
22 the information in question, including, for example, by restricting access to the information to
23 employees on a need-to-know basis. *See* 18 U.S.C. § 1839(3); *see also Segerdahl Corp. v. Ferruzza*,
24 2019 WL 77426 at *3 (N.D. Ill. Jan. 2, 2019); *Express Scripts v. Lavin*, 2017 WL 2903205 at *5, *6
25 (E.D. Missouri Jul. 7, 2017). Based on these principles, if it is true that Ms. Goeke, an Inventory
26 Analyst, had access to CZMI's source code, then CZMI's failure to restrict access to that information
27 would preclude a finding that CZMI's source code is worthy of trade secret status. (*See Religious*
28 *Technology Center v. Netcom On-Line Communication*, 923 F.Supp. 1231, 1253 (N.D. Cal. 1995).)
Thus, CZMI's failure to specifically delineate each trade secret in issue, who had access to it, and what
steps were taken to protect the secrecy of that particular piece of information collectively prevent this

27 on reply. (*Iconix, Inc. v. Tokuda*, 457 F.Supp.2d 969, 975-76 (N.D. Cal. 2006).) In the event that the
28 Court is inclined to accept such evidence, Topcon respectfully requests the right to submit a sur-reply
responding to that evidence.

1 Court from concluding that any trade secrets actually exist. Furthermore, absent CZMI's ability to
2 specifically identify the alleged trade secrets that it contends Topcon and its employees
3 misappropriated, this Court cannot issue a specific order giving instruction on what acts Topcon is
4 restrained from performing. Therefore, CZMI's motion must be denied.

5 CZMI's contention that it has protectable trade secrets is deficient for other reasons as well.
6 Among these, CZMI's delay in seeking relief to protect its alleged trade secrets belies trade secret status.
7 The case of *GEICO v. Nealey*, 262 F. Supp. 3d 153 (E.D. Pa. 2017), (dismissing DTSA claim on the
8 basis that Plaintiff waited eight months to assert claim and noting that reasonable measures were not
9 taken to protect the trade secret.

10 The case before this Court presents similar infirmities. CZMI alleges it "became suspicious
11 that so many long-time and high-ranking employees involved in CZMI's ODx Products were leaving
12 for Topcon by late 2018." (See Complaint at ¶ 13.) CZMI goes on to allege that its "suspicions were
13 eventually confirmed by the accidental receipt of an internal Topcon email dated February 22, 2019."
14 (*Id.* at ¶ 15.) CZMI was sufficiently concerned about its employees' departures that it contacted Topcon
15 in April 2019. (Samuels Decl., ¶ 3.) Despite believing that Topcon was supposedly misappropriating
16 its trade secrets by as early as the end of 2018, CZMI waited until July 19, 2019 to file its lawsuit. No
17 company that actually believes that a competitor is using its trade secrets waits months to take action,
18 and CZMI's laches thus belie its trade secret claims for the same reasons that a federal district court in
19 Pennsylvania found sufficient to dismiss a DTSA claim brought by a similarly lackadaisical plaintiff.

20 **B. CZMI Presents No Evidence That Topcon Misappropriated Its Confidential Information**

21 Moreover, even if CZMI were able to specifically identify its trade secrets, it has absolutely no
22 evidence that Topcon or any of its employees misappropriated those alleged trade secrets. In fact, none
23 of CZMI's purported evidence supports its conjecture that a misappropriation has occurred.

24 *i. The Fact that CZMI Former Employees Now Work for Topcon is Not Evidence of*
25 *Misappropriation Because California Does Not Recognize the Inevitable Disclosure*
Doctrine

26 As a preliminary matter, CZMI's statement that "[i]t cannot be a coincidence that all of these
27 employees ... sequentially left for a close competitor" is not evidence. (CZMI MPA 9:5-9.) Rather,
28 CZMI's statement is, at best, pure speculation; at worst, the statement reflects a flat-out conspiracy

1 theory. Although CZMI purports to recognize that “it is not unlawful for an employee to merely move
2 to a competitor company,” its argument that Topcon “appears poised” to release a product containing
3 CZMI’s alleged trade secrets stems from its unsupported suspicion around its former employees’ move
4 to Topcon. (CZMI MPA 3:19-20, 4:15-16.) However, California does not permit CZMI to try to prove
5 trade secret misappropriation by suggesting that its former employees’ new employment will inevitably
6 lead them to rely on CZMI’s trade secrets (the “inevitable disclosure doctrine”). (*Pellerin v. Honeywell*
7 *Intern., Inc.*, 877 F.Supp.2d 983 (2012).) A threat of misappropriation cannot, as a matter of law, be
8 inferred from the fact an employee, upon voluntarily terminating his employment, immediately began
9 working for a direct competitor and appears to be performing for his new employer the same or similar
10 job duties. (*Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F.Supp.2d 1111, 1120 (N.D. Cal. 1999).)

11 Here, Plaintiff argues that “Topcon has only been able to access CZMI’s trade secrets because
12 of their scheme to poach the Former Employees, and induce them to breach their duty to maintain
13 secrecy ...” (CZMI MPA 8:15-18.) However, this argument cannot stand because it is based on the
14 inevitable disclosure doctrine. As such, the fact that several employees left CZMI to work for Topcon
15 is neither direct, nor circumstantial evidence of trade secret misappropriation and does not support
16 CZMI’s request for a preliminary injunction.

17 ii. *The February 22, 2019 E-Mail is Not Evidence of Misappropriation Because the E-Mail*
18 *Contains Exclusively Publicly-Available Information*

19 The issues caused by CZMI’s failure to specifically identify its trade secrets are again displayed
20 in CZMI’s contention that Mr. Hoffmeyer’s February 22, 2019 e-mail discusses “CZMI’s trade secret
21 and confidential product information.” (CZMI MPA 9:11-13.) The e-mail does not discuss any of
22 CZMI’s trade secrets, and CZMI does not provide specific allegations demonstrating otherwise. Rather,
23 the February 22-23, 2019 e-mail discusses information exclusively found in the public domain.
24 (Hoffmeyer Decl., ¶ 6.) Thus, the information contained in the e-mail correspondence cannot be given
25 trade secret status. (*In re Providian Credit Card Cases*, 96 Cal.App.4th 292, 304 (2002).)

26 iii. *The March 2019 Poster is Not Evidence of Misappropriation and, Instead, is Sheer*
27 *Speculation*

28 Mr. Kurzke’s statement that Glaucoma Workplace was not “the ideal format for Glaucoma

1 suspects” does not demonstrate Topcon’s misappropriation of CZMI’s trade secrets. CZMI correctly
2 notes that Topcon is developing a product that will compete with Glaucoma Workplace called
3 Glaucoma Module. (Kurzke Decl., ¶ 14, 18.) However, design work on the Glaucoma Module was
4 underway before Mr. Kurzke joined Topcon and is a mere extension of a product Topcon has sold since
5 2007. (*Id.* at ¶¶ 18, 20.)

6 CZMI’s analysis of *BladeRoom Grp. Ltd. v. Emerson Elec. Co.* is inapplicable and does not
7 save its speculative arguments. Preliminarily, the *BladeRoom* court considered defendant’s motion for
8 judgment as a matter of law after a jury returned a verdict for plaintiffs. (*BladeRoom Grp. Ltd. v.*
9 *Emerson Elec. Co.*, 331 F.Supp.3d 977, 979-80 (N.D. Cal. 2018).) Accordingly, the court made no
10 comment as to the usefulness of circumstantial evidence (or lack thereof) on a motion for a preliminary
11 injunction. Further, in *BladeRoom*, plaintiff proved that defendant had used plaintiff’s trade secrets by
12 demonstrating nearly identical aspects of plaintiff and defendant’s products. Here, there is no such
13 proof. CZMI has not presented any declarations demonstrating the similarities between CZMI’s alleged
14 trade secrets and the new product Topcon is allegedly “poised” to release. CZMI has not presented a
15 declaration demonstrating that Glaucoma Module is similar in any fashion to Glaucoma Workplace.
16 CZMI has not offered a forensic report demonstrating that Topcon’s employees took confidential
17 information or trade secrets when they left CZMI’s employ. CZMI has not offered any e-mails that
18 Topcon employees sent to their personal e-mail accounts before leaving CZMI’s employ. Even if the
19 Court were to concede the value of circumstantial evidence on a motion for preliminary injunction,
20 CZMI has none. It has only speculation and conjecture.

21 In sum, it is unlikely that CZMI will prevail on the merits of its trade secret claims because
22 CZMI has not offered any evidence whatsoever in support of those claims. Accordingly, CZMI’s
23 Motion for a Preliminary Injunction should be denied on these grounds alone.

24 **V. CZMI HAS FAILED TO SHOW AN IRREPARABLE INJURY**

25 Beyond its inability to show a likelihood of success on the merits, CZMI is not entitled to the
26 extraordinary remedy it seeks because it cannot demonstrate that it will suffer irreparable injury
27 between the Court’s hearing on this motion and trial. CZMI delayed taking any action for **fifteen**
28 **months** after first becoming suspicious that its alleged trade secrets were in jeopardy - between April

1 2018 when Mr. Kurzke left the company and July 2019 when CZMI filed suit. Thus, CZMI cannot
2 legitimately claim that the resolution of this matter is urgent.

3 Indeed, the Supreme Court has held “that plaintiffs seeking preliminary relief [must]
4 demonstrate that irreparable injury is *likely* in the absence of an injunction.” (*Winter*, 555 U.S. at 22.)
5 To show this, CZMI must establish that the threatened injury is immediate, significant, and concrete or
6 non-speculative. (*See Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014)
7 (immediate); *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (non-
8 speculative); *Dept’t of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123-24 (9th
9 Cir. 2006) (significant).) As discussed more fully below, CZMI cannot satisfy this heavy burden
10 because the presumption of irreparable harm on which CZMI seeks to rely has been rejected by the
11 Ninth Circuit and any harm CZMI alleges it would suffer is purely speculative. Accordingly, for this
12 separate reason, CZMI’s motion should be denied.

13 **A. There is No Presumption of Irreparable Harm in the Ninth Circuit**

14 CZMI broadly claims that this Court may presume that CZMI will suffer irreparable harm upon
15 a showing that its proprietary information has been misappropriated.⁸ However, the Ninth Circuit has
16 rejected the presumption of irreparable harm in trade secret cases. (*GSI Tech., Inc. v. United Memories,*
17 *Inc.*, C 13-1081 PSG, 2013 WL 12172990, at *11 (N.D. Cal. Aug. 21, 2013); *Flexible Lineline Sys.,*
18 *Inc. v. Precisions Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011).)

19 The unpublished decision on which CZMI relies to support its point is readily distinguishable.
20 In *Western Directories, Inc. v. Golden Guide Directories, Inc.*, this Court presumed that plaintiff –
21 defendant’s former employer – suffered irreparable harm because defendant stole a computer from his
22 former employer and commented that the computer had “everything he needed to run his new
23 business.” (*Western Directories, Inc.*, 2009 WL 1625945, at *4-5 (N.D. Cal. June 8, 2009).) Because
24 the former employer in *Western Directories* submitted credible evidence raising serious concerns as to
25 whether defendant had already stolen a database of plaintiff’s existing clients, this Court presumed
26 plaintiff would suffer irreparable harm if the defendant interfered with plaintiff’s business relationships.

27
28

⁸This argument is also unavailing because CZMI cannot show that its proprietary information has been
misappropriated.

1 (Id. at 5-6.) Here, there is no evidence that Topcon has misappropriated or used any confidential
2 information obtained from CZMI.

3 The other unpublished decision cited by CZMI, *Lillge v. Verity*, is similarly inapposite. In
4 *Lillge*, plaintiff submitted evidence that it had already lost at least one client due to defendant's
5 misappropriation, and risked losing more as defendant established its new business. (*Lillge v. Verity*,
6 No. C 07-2748 MHP, 2007 U.S. Dist. LEXIS 73543 (N.D. Cal. Oct. 1, 2007).) Despite these facts, this
7 Court did **not** presume irreparable harm. Instead, this Court found that plaintiff failed to prove a
8 likelihood of success on the merits and, therefore, declined to reach a conclusion on the issue of
9 irreparable harm.

10 **B. CZMI Does Not Face a Likelihood of Irreparable Harm**

11 Further, CZMI cannot show any potential of irreparable harm that rises above pure speculation.
12 Although CZMI argues Topcon is unfairly developing a competing product containing CZMI's trade
13 secrets and confidential information, it fails to identify the product that Topcon is allegedly "poised to"
14 release or the manner in which that product purportedly contains CZMI's trade secrets. Topcon denies
15 this allegation and counters that it competed lawfully with CZMI for decades before Mr. Kurzke joined
16 the Company. (Kurzke Decl., ¶¶ 22-23.) Further, as discussed at length above, CZMI's reference to the
17 February 22-23, 2019 e-mail and Mr. Kurzke's critical comment about Glaucoma Workplace do not
18 support CZMI's argument. The e-mail contains exclusively publicly-available information.
19 (Hoffmeyer Decl., ¶ 6.) Mr. Kurzke's comment that Glaucoma Workplace might not be the "ideal
20 format" for a certain patient population does not suggest, much less prove, that Mr. Kurzke plans to
21 develop a competing product with CZMI's trade secrets or confidential information. Not surprisingly,
22 CZMI cites no case supporting the proposition that injunctive relief to avoid such speculative harm is
23 appropriate. To the contrary, the law is clear that "[s]peculative injury does not constitute irreparable
24 injury sufficient to warrant granting a preliminary injunction." (*Caribbean Marine Servs. Co. v.*
25 *Baldridge*, 844 F.2d 668, 674 (9th Cir. 1998); see also *In re Excel Innovations, Inc.*, 502 F.3d 1086,
26 1098 (9th Cir. 2007).)

27 CZMI also offers no explanation as to why monetary damages would be inadequate to
28 compensate it for any injury. (*Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (holding

1 that where monetary damages can compensate plaintiff, preliminary injunction is not justified.) In fact,
2 “[e]conomic damages are not traditionally considered irreparable because the injury can later be
3 remedied by a damage award.” (*Delphon Indus. LLC v. Int’l Test Sols, Inc.*, No. 11-CV-1338-PSG,
4 2011 WL 4915792, at *3 (N.D. Cal. Oct. 17, 2011).)

5 **C. CZMI’s Delay in Filing This Action Refutes a Finding of Any Alleged Irreparable Harm**

6 Finally, CZMI’s claim of irreparable harm is undermined by its delay in filing for relief. A
7 “long delay before seeking a preliminary injunction implie[s] a lack of urgency and irreparable harm.”
8 (*Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Larsen v. City*
9 *of San Carlos*, No. 14-CV-04731-JD, 2014 WL 5473515, at *3 (N.D. Cal. Oct. 28, 2014) (three month
10 too long); *Hiramanek v. Clark*, No. C-13-0228 EMC, 2013 WL 5082640, at *1 (N.D. Cal. Sept. 13,
11 2013) (one month too long).)

12 In this inquiry, the proper focus is on the point in time when plaintiff was “aware, or should
13 have been aware” of the alleged wrongdoing. (*Kwan Software Eng’g, Inc. v. Foray Techs., LLC*, No.
14 C 12-03762 SI, 2013 WL 244999, at *8 (N.D. Cal. Jan. 22, 2013), aff’d, 51 F. App’x 298 (9th Cir.
15 2013).) When a plaintiff suspects wrongdoing, the clock has already started ticking. (*See Blackmon v.*
16 *Tobias*, No. C 11-2853 SBA, 2011 WL 2445963, at *4 (N.D. Cal. June 16, 2011).) Here, the clock
17 began to tick in April 2018, **fifteen months** before CZMI initiated this lawsuit, when CZMI became
18 suspicious about Mr. Kurzke’s departure. (CZMI MPA 3:28-4:2.) Even after CZMI “confirmed” its
19 suspicions in February 2019, it still waited **five months** to seek relief. (CZMI MPA 4:26-5:2.) CZMI
20 even waited another **three months** after speaking with Topcon about the departure of its employees
21 before filling suit. (Samuels Decl., ¶ 3.) Thus, CZMI’s own admissions regarding their suspicions of
22 alleged wrongdoing establish the absence of any urgency.

23 **VI. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY**
24 **DISFAVOR AN INJUNCTION**

25 Because CZMI has not shown a likelihood of success on the merits or a significant risk of
26 irreparable injury, this Court need not evaluate whether the balance of hardships favor an injunction or
27 the public interest. However, even if CZMI *had* demonstrated likelihood of success on the merits (it
28 has not), it must also show that the “balance of hardships tip sharply in its favor” and that an injunction

1 would promote the “public interest.” (*Bayer Corp.*, 72 F.Supp.2d at 1120.) Although CZMI is
2 responsible for showing *both* that the balance of hardships *and* the public interest weigh in its favor, the
3 two concepts are interrelated. (*See Lear, Inc. v. Adkins*, 395 U.S. 670 (1969) (“[T]he equities of the
4 licensor do not weigh very heavily when they are balanced against the important public interest in
5 permitting full and free competition in the use of ideas which are in reality a part of the public
6 domain.”).) CZMI has failed to meet its burden as to both.

7 The best way to promote the public interest is by encouraging fair and vigorous competition in
8 the use of ideas. (*Yamashita v. Wilbur-Ellis Co.*, No. C 06-01690 (WHA), 2006 WL 1320470, at *8
9 (N.D. Cal. May 15, 2006).) Although CZMI claims that its request for an injunction is designed to
10 maintain the status quo, that would not be the practical result of its requested order. (CZMI MPA 13:8-
11 10.) Rather, by virtue of CZMI’s failure to identify its allegedly protectable trade secrets and
12 confidential information and where those secrets purportedly exist within Topcon’s products, CZMI is
13 actually asking this Court to prevent Topcon from releasing any new products. What’s more, CZMI’s
14 request is based on no more than its unsupported conspiracy theory that one of Topcon’s new products
15 will contain CZMI’s trade secrets or confidential information. Rather than attempting to preserve the
16 status quo, CZMI seeks to stymie legitimate and lawful competition and gain insight into Topcon’s
17 future products.

18 **VII. EXPEDITED DISCOVERY IS NOT PROPER BECAUSE CZMI HAS FAILED TO
19 IDENTIFY ITS TRADE SECRETS WITH REQUISITE PARTICULARITY AND NO
URGENCY JUSTIFIES THE PROPOSED INVASION OF DEFENDANTS’ PRIVACY**

20 To commence discovery, CZMI must *first* identify its alleged trade secrets with “reasonable
21 particularity” (*WeRide Corp.*, 379 F.Supp.3d at 846) (applying Cal. Civ. Proc. Code § 2019.210).)
22 Here, CZMI all but concedes that its vague description of its trade secrets is insufficient to warrant the
23 commencement of discovery. (CZMI MPA, 11:5, fn. 2.) In fact, the description supplied is insufficient
24 for CZMI to begin discovery at all – much less on an expedited basis. (*Loop AI Labs, Inc. v. Gatti*, 195
25 F.Supp.3d 1107, 1116-17 (N.D. Cal. 2016).)

26 Moreover, no urgency justifies the broad proposed invasion contemplated by CZMI’s proposed
27 discovery requests. To obtain expedited discovery, CZMI must show that it will be irreparably harmed
28 by delaying discovery until after the Rule 26 conference, and that any prejudice to Topcon is

1 outweighed by considerations of justice and CZMI's need for the discovery. (*Semitool, Inc. v. Tokyo*
2 *Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Am. LegalNet, Inc. v. Davis, Inc.*, 673
3 F.Supp.2d 1063, 1066, 67 (C.D. Cal. 2009).) As discussed at length above, CZMI cannot establish
4 urgency after waiting **fifteen months** after Mr. Kurzke's resignation to take steps to protect its alleged
5 trade secrets. Further, the fact that CZMI has set forth no evidence supporting its claim of
6 misappropriation distinguishes the instant matter from the cases on which CZMI relies. (*WeRide*, 379
7 F.Supp.3d at 854-55 (good cause for expedited discovery where defendant had already deleted
8 computer files); *KLA-Tencor Corp v. Murphy*, 09-01922 (RMW) (N.D. Cal. May 4, 2009), ECF No.
9 16) (same); *Washington v. Lumber Liquidators, Inc.*, No. 15-CV-01475 (JST), 2015 WL 2089992, at
10 *7 (May 5, 2015 N.D. Cal.) (request granted where defendants engaged in "deceptive behavior").)

11 In stark contrast to the absence of any need for the discovery, the prejudice to Topcon if the
12 Court were to grant CZMI's request for expedited discovery would be substantial. To be sure, CZMI
13 has asked the Court to require that Topcon submit its "electronic databases" to forensic inspection by
14 CZMI without regard to the sensitive competitive information stored within those databases. While
15 CZMI may very well desire to have unfettered access to a competitor's electronic database, the
16 inappropriateness of such a request is obvious on its face, particularly when CZMI has utterly failed to
17 identify a single specific piece of information that it is seeking. Furthermore, CZMI similarly disregards
18 the significant privacy interest Topcon employees' have in their personal devices. (*See Riley v.*
19 *California* (2014) 573 U.S. 373.)

20 **VIII. CONCLUSION**

21 For the foregoing reasons, Topcon respectfully requests that this Court deny CZMI's motion in
22 its entirety.

23 Dated: August 7, 2019

Respectfully submitted,

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